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Note

PERPETUALLY TURNING OUR BACKS TO THE MOST VULNERABLE: A CALL FOR THE APPOINTMENT OF COUNSEL FOR UNACCOMPANIED MINORS IN DEPORTATION PROCEEDINGS

SAMANTHA CASEY WONG

The rate of young illegal migrants crossing the United States' borders has reached unprecedented levels. Many children are fleeing their home countries in order to escape gang violence or to reunite with their family in the United States. Others are being smuggled into the country without any comprehension of the migration. In 2012, the United States Border Patrol apprehended a staggering 31,029 minors. An astonishing seventy-nine percent of them were seized without parental or legal guardians, thereby becoming known as "unaccompanied minors" within the immigration system. In immigration court, all illegal immigrants are denied the right to appointed legal counsel in deportation proceedings. Thus, many unaccompanied minors, all under the age of eighteen, appear pro se before immigration judges. After offering some background regarding unaccompanied minors and the history of their treatment under immigration law, this Note argues that these minors should be afforded the same legal rights as minors in juvenile court. Specifically, unaccompanied minors should be afforded the right to appointed legal counsel in order to protect their due process rights. The sheer statistics and basic injustices warrant a policy change in the immigration system. The immigration court has already acknowledged the specific vulnerability of unaccompanied minors and must take the next logical step in protecting their due process rights.

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PERPETUALLY TURNING OUR BACKS TO THE MOST VULNERABLE: A CALL FOR THE APPOINTMENT OF COUNSEL FOR UNACCOMPANIED MINORS IN DEPORTATION PROCEEDINGS

SAMANTHA CASEY WONG*

*“In short, it is obvious to the Court that the situation faced by unaccompanied minor aliens is inherently coercive.”*¹

I. INTRODUCTION

Walking into a courtroom ignites an immediate feeling of apprehension, regardless of your age. This feeling emerges for all individuals who walk through the courtroom doors; the physical environment invokes an overwhelming sense of seriousness. Now imagine being six years old, in an unknown place, without your parents or friends, and in need of a translator to even remotely understand what is going on in that moment. Imagine the immigration judge calling your name and being unable to find you in the courtroom.

Juan Gonzalez, a six-year-old unaccompanied minor, found himself in just this situation.² Struggling to see over the court’s wooden benches, the presiding judge could not even find Juan in the courtroom.³ Little Juan needed the vital assistance of a translator and a nudge from a social worker to state his full name and age for the court record.⁴ After successfully stating his name and age, Juan felt a sense of accomplishment.⁵ Unbeknownst to Juan, he faced the stark reality of not reuniting with his undocumented parents within the United States, but instead being deported back to an unsafe environment in Mexico.⁶ Many unaccompanied minors similarly find themselves in immigration proceedings with little to no

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¹ Perez-Funez v. Dist. Dir., INS, 619 F. Supp. 656, 662 (C.D. Cal. 1985).

² Julia Preston, *Young and Alone, Facing Court and Deportation*, N.Y. TIMES, Aug. 26, 2012, at A1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See *id.* (“Most likely [Juan’s case] would end with a final order for his deportation.”).

understanding of the English language, the American legal system, or what it means to have crossed into another country.⁷ They face the harsh reality of arrest, detention, and the possibility of removal—completely alone.⁸

Unaccompanied minors, under the age of eighteen years old, have no legal immigration status in the United States and do not have a parental or legal guardian to provide care and physical custody for them within the United States.⁹ On March 1, 2003, the care and custody of unaccompanied minors was transferred from the Immigration and Nationalization Service (INS) to the Office of Refugee Resettlement (ORR).¹⁰ While these unaccompanied minors do have some constitutional rights, a right to counsel is not one of them.¹¹ The lack of a right to appointed counsel for unaccompanied minors affords them three options: hire an attorney, locate free legal counsel, or proceed pro se. For a child, these options turn into the daunting reality of representing themselves as they attempt to navigate one of the most complex legal systems.¹² The United States Code specifies

⁷ See, e.g., Claire L. Workman, Note, *Kids Are People Too: Empowering Unaccompanied Minor Aliens Through Legislative Reform*, 3 WASH. U. GLOBAL STUD. L. REV. 223, 223 (2004) (suggesting many minors cannot understand English or the legal system); Preston, *supra* note 2 (claiming an unaccompanied minor did not understand that she had crossed international borders or that she was in the United States).

⁸ Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 219 (2006). After the Department of Homeland Security arrests the children, they are transferred to the care of the Office of Refugee Resettlement Division of Unaccompanied Children's Services. *Id.* at 222.

⁹ See Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2) (2012) (defining "unaccompanied alien child"). It is important to recognize, however, that many unaccompanied minors have parents within the United States, but their illegal immigration status forces them into hiding and thus they are unable to help their children. See, e.g., OLGA BYRNE & ELISE MILLER, VERA INST. OF JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS 10 (2012), available at <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf> ("Given the fear of deportation, however, undocumented family members living in the United States may not come forward when the child is apprehended."); Preston, *supra* note 2 (stating that six-year-old Liliana Muñoz had to represent herself in her removal proceeding because her parents did not accompany her due to being "fearful of the immigration officer at the court entrance").

¹⁰ 6 U.S.C. § 279(a); Workman, *supra* note 7, at 224–25; see also Nugent, *supra* note 8, at 222 ("The INS suffered from a fundamental conflict of interest when acting as a police officer, prosecutor and guardian of the children at the same time.").

¹¹ See *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (noting that the Due Process Clauses of the Fifth and Fourteenth Amendments apply to all persons within the United States, regardless of their citizenship status); *Perez-Funez v. Dist. Dir., INS*, 619 F. Supp. 656, 659 (C.D. Cal. 1985) ("[Unaccompanied children] do not possess rights equivalent to those of criminal defendants. . . . [T]here is no due process or statutory right to appointed counsel." (citations omitted)).

¹² For example, when Juan appeared in immigration court without a parent or lawyer, presiding Judge Howard E. Achtsam reportedly told him and a courtroom full of other minors: "If you do not have a lawyer . . . you need to be ready to speak for yourselves at your next hearing." Preston, *supra* note 2. Pro bono lawyers were reluctant to take another minor's weak case because both of her illegal parents live in the United States. *Id.*

that:

In any removal proceeding before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose.¹³

At the onset of a removal proceeding, judges must advise respondents of their right to counsel and confirm that they have received a list of free legal services.¹⁴ In *Reno v. Flores*,¹⁵ the parties' ultimate settlement agreement set the standard for the treatment of unaccompanied minor aliens in detention.¹⁶ In that case, numerous minors detained by INS filed a class action lawsuit.¹⁷ One of the mandated provisions under the settlement ensures that unaccompanied minors receive a list of attorneys.¹⁸

Having legal representation in court proceedings is invaluable. Attorneys utilize their training and expertise to evaluate the child's chance of obtaining immigration relief; file applications, pleadings, and motions; and advocate before immigration judges for the best interest of the child during hearings and interviews.¹⁹ The immigration system already poses a complex legal hurdle that most adults without a legal education can barely

¹³ 8 U.S.C. § 1362 (2012) (emphasis added); *see also* Memorandum from the U.S. Dept. of Justice Exec. Office for Immigration Review, Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children 4 (May 22, 2007) [hereinafter Guidelines for Immigration Court], available at <http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf> (stressing that immigration judges are not permitted to appoint legal representation).

¹⁴ The Code of Federal Regulations mandates that in removal proceedings, immigration judges shall:

- (1) Advise the respondent of his or her right to representation, *at no expense to the government*, by counsel of his or her own choice authorized to practice in the proceedings and require the respondent to state then and there whether he or she desires representation;
- (2) Advise the respondent of availability of *free legal services* provided by organizations and attorneys . . . located in the district where the removal hearing is being held;
- (3) Ascertain that the respondent has received a list of such programs, and a copy of appeal rights.

8 C.F.R. § 1240.10(a)(1)–(3) (2013) (emphases added).

¹⁵ 507 U.S. 292 (1993).

¹⁶ *Id.* at 298; Workman, *supra* note 7, at 229.

¹⁷ Sharon Finkel, Note, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1110 (2001).

¹⁸ Workman, *supra* note 7, at 229.

¹⁹ AMNESTY INT'L, UNITED STATES OF AMERICA: UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION 62 (2003), available at <http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/unaccompanied%20children%20in%20immigration%20detention.pdf>.

navigate.²⁰ By denying unaccompanied minors in deportation proceedings the right to appointed counsel, the immigration legal system abuses the due process rights of one of the most vulnerable groups of respondents. Regardless of whether an individual is a legal citizen, once they are within the United States they are protected by due process rights.²¹ This nation prides itself on the constitutional protections given to all, including those who have been accused of heinous crimes.²² The child's illegal status and diminished capacity as a minor should not alter their due process protections.

Under the Constitution, the Fifth Amendment guarantees these immigrant children due process protection.²³ In light of the unprecedented surge of unaccompanied minors into the United States, it would be unjust to rely on limited pro bono services. Unaccompanied minors' right to appointed counsel should mirror that of minors in domestic juvenile courts. Both subsets of minors share similar characteristics, which should be protected analogously under the law. Amnesty International has echoed this sentiment through the words of Robert Hirshon, former President of the American Bar Association:

It is ironic that the domestic juvenile offenders in juvenile jails have the right and access to legal counsel, but the children being detained by the INS do not. These children, young people who may have limited formal education and almost certainly not proficient [sic] in the English language are led into immigration proceedings where they are pitted against well-trained, well-educated, and experienced INS attorneys. This is not a fair fight. . . . After traveling alone and facing detention alone, they all too often confront a new and daunting challenge—defending themselves in immigration proceedings alone.²⁴

This Note will begin by examining the recent surge of unaccompanied minors crossing into the United States in Part II. Parts III and IV will respectively provide brief histories of the vulnerability of minors within the juvenile and immigration systems. Part V will demonstrate that the legal rights of children in domestic juvenile court are parallel to the rights of unaccompanied minors. In Part VI, this Note will advocate for the right to

²⁰ Finkel, *supra* note 17, at 1131.

²¹ *Id.* at 1117; Irene Scharf & Christine Hess, *What Process Is Due? Unaccompanied Minors' Rights to Deportation Hearings*, 1988 DUKE L.J. 114, 116.

²² See Sonia Nazario, *Child Migrants, Alone in Court*, N.Y. TIMES, Apr. 11, 2013, at A23 (remarking that even murderers and rapists have a right to counsel).

²³ Finkel, *supra* note 17, at 1132.

²⁴ AMNESTY INT'L, *supra* note 19, at 63 (second alteration in original) (quoting Robert E. Hirshon, President, Am. Bar Assoc., Remarks at Immigration Judges Conference (June 6, 2002)).

appointed counsel for unaccompanied minors and emphasize that the immigration system already recognizes minors' vulnerability; this is merely the next logical step in protecting the due process rights of minors. Finally, this Note will assert that the stigma of illegal immigration should not strip these children of due process rights that are essential in providing them with fair and just removal proceedings. With the overwhelming number of unaccompanied minors crossing our borders, immigration courts must be legally required to provide appointed counsel to all qualifying unaccompanied minors.

II. THE RECENT SURGE OF UNACCOMPANIED MINORS IN THE UNITED STATES

A. *Who Is Crossing Our Borders?*

Children cross the border into the United States for various reasons. Many are fleeing persecution, others are trying to relocate after their family has already immigrated, and still others are smuggled into the country without full knowledge of the situation.²⁵ Although this is not an entirely new phenomenon, over the past decade, the number of unaccompanied minors that are apprehended has increased steadily.²⁶ In fiscal year 2011, the United States Border Patrol apprehended 23,089 minors.²⁷ Nearly seventy percent of those minors, 16,067 in total, were unaccompanied.²⁸ By fiscal year 2012, the portion of detained minors that were unaccompanied rose to nearly seventy-nine percent.²⁹ A significant amount of these recent unaccompanied minors are coming from Central America, specifically Guatemala, Honduras, and El Salvador.³⁰

The federal government must address the stark reality that

²⁵ See David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 998–99 (2002) (providing a non-exhaustive list of examples of how children are displaced to the United States).

²⁶ The number of young illegal migrants trying to cross into the United States increased by 20,000 between 2001 and 2005. Raya Jarawan, Note, *Young, Illegal, and Unaccompanied: One Step Short of Legal Protection*, 14 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 125, 127 (2007).

²⁷ *Juvenile and Adult Apprehensions—Fiscal Year 2011*, U.S. BORDER PATROL 4, http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbpat_statistics/usbpat_fy11_stats/fy_profile_2011.ctt/fy_profile_2011.pdf (last visited Nov. 29, 2013).

²⁸ *Id.* The ORR, which is part of the Department of Health and Human Services, is responsible for unaccompanied alien children, and the Department of Homeland Security is responsible for accompanied minors. Guidelines for Immigration Court, *supra* note 13, at 3.

²⁹ See *Juvenile and Adult Apprehensions—Fiscal Year 2012*, U.S. BORDER PATROL 1, http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbpat_statistics/usbpat_fy12_stats/usbpat_juv_adult_appr.ctt/usbpat_juv_adult_appr.pdf (last visited Nov. 29, 2013) (providing that 24,481 out of 31,029 total minors apprehended were unaccompanied).

³⁰ WOMEN'S REFUGEE COMM'N, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA 4 (Oct. 2012), available at <http://www.youthtoday.org/hotdocs/Forced%20From%20Home1.pdf>.

unaccompanied young migrants frequently try to cross the country's borders. Immigration courts must adapt accordingly to ensure that they conduct fair hearings for one of the weakest populations of illegal immigrants.³¹ The current protections in place for unaccompanied minors in immigration court are insufficient to preserve the legal rights of a rising demographic of respondents.³² With sixty Executive Office of Immigration Review (EOIR) courts in the United States,³³ pro bono legal counsel do not have the capacity and means to represent every unaccompanied minor in a removal proceeding.

B. Remedies Available

Upon the apprehension of unaccompanied minors, various forms of legal relief are available. The most common forms of legal relief for minors include: (1) asylum; (2) protection under the United Nations Convention Against Torture (CAT); (3) U-Visas for crime victims and T-Visas for trafficking victims; (4) special immigration juvenile status (SIJS); (5) family-based petitions for legal permanent residence; and (6) voluntary departure.³⁴ Preliminary findings indicate that the recent surge of unaccompanied minors fleeing their countries can be attributed to gang violence and drug trafficking.³⁵ It is crucial to note that recent illegal migrants *will not* qualify for legal relief under the DREAM Act or President Obama's immigration policy allowing prosecutorial discretion for respondents who have no criminal convictions.³⁶ Additionally, in the EOIR statistical report for 2011, seventy-three percent of all immigration

³¹ Cf. Preston, *supra* note 2 ("The influx has heightened concerns that young people without legal help may not be able to obtain even the most basic justice.").

³² See Press Release, U.S. Dep't of Justice, Unaccompanied Alien Children in Immigration Proceedings (Apr. 22, 2008) (describing existing practices, such as immigration judges encouraging pro bono representation, holding juvenile dockets, fostering child-friendly courtrooms, participating in child issue training, and attending the Executive Office for Immigration Review's (EOIR's) Legal Orientation Program). The EOIR acknowledges the vulnerability of unaccompanied minors. *Id.* The EOIR seems content with facilitating pro bono representation for unaccompanied minors and knowing that at least ten courts have enacted "juvenile dockets" in Arizona, California, Florida, Illinois, New York, and Texas. *Id.* The juvenile dockets "facilitate consistency, encourage child-friendly courtroom practices, and promote pro bono representation." *Id.* However, it is nearly impossible to rely on pro bono representation for every respondent given the surge of unaccompanied minors.

³³ *EOIR Immigration Court Listing*, U.S. DEP'T JUST., <http://www.justice.gov/eoir/sibpages/ICadr.htm> (last updated May 2013) [hereinafter *EOIR Court Listing*].

³⁴ BYRNE & MILLER, *supra* note 9, at 24; see MARICELA GARCIA, UNACCOMPANIED CHILDREN IN THE UNITED STATES: CHALLENGES AND OPPORTUNITIES 3 (2008), available at <http://www.latinopolicyforum.org/resources/document/Unaccompanied-Children-Article.pdf> (explaining the operation of each of the available forms of legal relief for minors).

³⁵ Preston, *supra* note 2.

³⁶ See *id.* (indicating that legal relief could protect some unaccompanied minors who would otherwise qualify for prosecutorial discretion).

judges' decisions resulted in deportation orders.³⁷

1. *Asylum*

Asylum may cover respondents who fear that, upon return to their home countries, they would be subject to persecution by their government or by an agent that the government is not willing to control.³⁸ Respondents can seek asylum as a defense against removal before an EOIR immigration judge or affirmatively apply for asylum through the United States Citizenship and Immigration Services (USCIS) Office.³⁹ Unaccompanied minors must be within the United States or at a border to apply for asylum admission.⁴⁰ The legal standard for asylum requires a well-founded fear of persecution based on one of the following grounds: "race, religion, nationality, membership in a particular social group, or political opinion."⁴¹ Notably, the United States does not recognize minors as a social group for asylum purposes.⁴² That being said, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008⁴³ addressed and acknowledged the unique characteristics of unaccompanied minors and amended asylum procedures to allow such minors to first be seen by USCIS asylum officers to preserve a non-adversarial atmosphere.⁴⁴

2. *Convention Against Torture (CAT) Protection*

The CAT mandates, under article three, that the United States will not expel, return, or extradite a person to another country where he or she would be tortured.⁴⁵ EOIR judges determine CAT protection claims during a removal proceeding.⁴⁶ The Government can choose from two protections under the CAT: deferring removal or withholding removal.⁴⁷ Deferral of removal, a temporary form of protection, applies to those who face torture

³⁷ OFFICE OF PLANNING, ANALYSIS, & TECH., EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2011: STATISTICAL YEAR BOOK, at D2 (2012), available at <http://www.justice.gov/eoir/statspub/fy11syb.pdf>.

³⁸ GARCIA, *supra* note 34, at 3.

³⁹ BYRNE & MILLER, *supra* note 9, at 25.

⁴⁰ Press Release, U.S. Dep't of Justice, Asylum Protection in the United States (Apr. 28, 2005) [hereinafter Asylum Press Release], available at <http://www.justice.gov/eoir/press/05/AsylumProtectionFactsheetQAApr05.htm>.

⁴¹ *Id.*

⁴² GARCIA, *supra* note 34, at 3.

⁴³ Pub. L. No. 110-457, 122 Stat. 5044 (codified in scattered titles of U.S.C.).

⁴⁴ *Id.* § 235(d)(7)(B), 122 Stat. at 5081 (codified as amended at 18 U.S.C. 1158(b)(3) (2012)); see BYRNE & MILLER, *supra* note 9, at 25 (indicating that asylum cases will only reach immigration court, i.e., an adversarial hearing, if USCIS initially denies the application).

⁴⁵ Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment art. 3, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85.

⁴⁶ Asylum Press Release, *supra* note 40.

⁴⁷ See *id.* (stating that the government may remove the person to another country where they will not be tortured).

in their home country but are ineligible for withholding of removal status.⁴⁸ CAT protection for recent illegal immigrants may seem similar to asylum, but there are key differences. The CAT does not allow individuals to apply for permanent residency, extend protection to family members, or require a finding based on the five grounds for asylum.⁴⁹ However, it can assist individuals who do not qualify for asylum and is mandatory for eligible respondents.⁵⁰

3. *U-Visas and T-Visas*

Victims of designated crimes may apply for visas to seek refuge in the United States for a specific time period.⁵¹ U-Visas apply to respondents who “suffered substantial physical or mental abuse as a result of having been a victim of . . . criminal activity,” and a law enforcement agency provides a certification indicating that this individual has assisted or will assist in investigating or prosecuting the crime.⁵² T-Visas are reserved for respondents who have fallen victim to “severe forms of trafficking in persons,”⁵³ but minors do not have to assert that they are assisting law enforcement in their investigation.⁵⁴ If granted, minors can obtain lawful permanent residency, and both types of visas allow them to petition for an extension of their legal status to their nuclear family.⁵⁵

4. *Special Immigrant Juvenile Status (SIJS)*

In 1990, Congress created SIJS to allow illegal minors the opportunity to “self petition” for legal status.⁵⁶ SIJS applies to eligible minors who have been victims of abuse, neglect, or abandonment by their parents, and are fleeing their home countries.⁵⁷ The SIJS process involves juvenile state courts as well as the immigration system. Unaccompanied minors seeking SIJS must obtain a court order declaring that the minor is “dependent on the [juvenile] court; that they have been abused, abandoned, or neglected; and that it is not in their best interest to return to their home country.”⁵⁸ The specific procedures of obtaining this order vary from state to state.⁵⁹

⁴⁸ See *id.* (noting that ineligibility of withholding of removal can be due to past criminal convictions).

⁴⁹ *Id.*

⁵⁰ See *id.* (noting that asylum is made on a discretionary basis).

⁵¹ BYRNE & MILLER, *supra* note 9, at 26.

⁵² *Id.*

⁵³ 22 U.S.C. § 7102(8) (2012).

⁵⁴ BYRNE & MILLER, *supra* note 9, at 26.

⁵⁵ *Id.*

⁵⁶ Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005–06 (current versions at 8 U.S.C. §§ 1101(a)(27)(J), 1227(c) (2012)); Jarawan, *supra* note 26, at 147.

⁵⁷ 8 U.S.C. § 1101(a)(27)(J); AMNESTY INT’L, *supra* note 19, at 14.

⁵⁸ BYRNE & MILLER, *supra* note 9, at 26.

⁵⁹ *Id.*

Unfortunately, some state requirements have prevented even *legally represented, eligible* children from obtaining SIJS.⁶⁰ The heavy burden falls on the child to persuade the court that they must remain in the United States to stay alive and safe.⁶¹ If the child obtains a state court order, he or she can then proceed to apply for SIJS and legal permanent residency with USCIS.⁶²

5. *Family-Based Petitions for Legal Residence*

Visas may be granted based on one of the following familial relations: (1) an immediate relative's legal citizenship (i.e., an Immediate Relative Immigrant Visa); or (2) a distant familial relationship with a U.S. citizen or lawful permanent resident (i.e., a Family Preference Immigrant Visa).⁶³ An unaccompanied minor could potentially apply as an "IR-2," an unmarried child under twenty-one years of age of a U.S. citizen, if one of the child's parents is a lawful citizen.⁶⁴ In addition, an unaccompanied minor could qualify under any of the four family preferences under a Family Preference Immigrant Visa.⁶⁵ There is a limitation on the number of Family Preference Immigration Visas per fiscal year while Immediate Relative Immigration Visas are not restricted.⁶⁶ Importantly, children can only be beneficiaries and not petitioners for this type of family-based relief.⁶⁷

⁶⁰ *Id.*; see, e.g., *In re Erick M.*, 820 N.W.2d 639, 641, 648 (Neb. 2012) (ruling that a minor did not meet the standard, even though the federal SIJS requirement would be satisfied if "reunification with '1 or both of the immigrant's parents' [was] not feasible" because of "abuse, neglect, or abandonment," because the state interpreted its requirement to mean that a minor was ineligible if reunification with either parent was feasible).

⁶¹ Jarawan, *supra* note 26, at 147.

⁶² BYRNE & MILLER, *supra* note 9, at 26.

⁶³ U.S. Dep't of State, *Family-Based Immigrant Visas*, TRAVEL.STATE.GOV, http://www.travel.state.gov/visa/immigrants/types/types_1306.html (last visited Nov. 29, 2013).

⁶⁴ *Id.*

⁶⁵ The Department of State proffers the following classifications:

Family First Preference (F1): Unmarried sons and daughters of U.S. citizens, and their minor children, if any. . . .

Family Second Preference (F2): Spouses, minor children, and unmarried sons and daughters (age 21 and over) of [lawful permanent residents]

Family Third Preference (F3): Married sons and daughters of U.S. citizens, and their spouses and minor children. . . .

Family Fourth Preference (F4): Brothers and sisters of U.S. citizens, and their spouses and minor children, provided the U.S. citizens are at least 21 years of age.

Id.

⁶⁶ *Id.*

⁶⁷ Thronson, *supra* note 25, at 994.

6. *Voluntary Departure*

Voluntary departure allows unaccompanied minors to return to their home country without any of the legal consequences associated with a formal order of removal by an immigration court.⁶⁸ A voluntary departure may or may not occur after a hearing before an EOIR immigration judge.⁶⁹ All apprehended minors must be given a Form I-770, Notice of Rights and Disposition.⁷⁰ If a child seeks voluntary departure before an EOIR immigration initial hearing, he or she must be notified of the opportunity to call an attorney, relative, or friend; receive a list of free legal services; and have access to a telephone line.⁷¹ To qualify for voluntary departure, a respondent must admit removability—among other requirements.⁷² However, special limitations, such as only accepting admissions by minors who are accompanied in court by an attorney or another competent adult, were enacted to protect children from making legal admissions that they do not understand.⁷³ Voluntary departure alleviates the need to conduct a full deportation proceeding and allows illegal immigrants to return to their home countries without any legal consequences in the United States. Adults are presumed to have the autonomy to decide for or against a legal admission for voluntary departure. However, many minors lack the full maturity to make such a critical decision and need the presence of an adult before any admission is given before the court.

With the various forms of legal relief available to illegal aliens, many individuals receive the opportunity to stay within the United States. Yet, unaccompanied minors may miss the option of applying for and being granted a second chance in the United States due to their lack of legal knowledge and guidance by a licensed attorney. The benefit of appointed legal counsel will ensure that minors who deserve the legal relief will receive it. Procedural justice can be achieved when the immigration system recognizes the constitutional right to counsel for unaccompanied minors. The emergence of the juvenile justice system illustrates society's progression toward respecting the due process rights of minors and should

⁶⁸ BYRNE & MILLER, *supra* note 9, at 26.

⁶⁹ *Voluntary Departure*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9e258fa29935f010VgnVCM1000000ecd190aRCRD&vgnnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD> (last visited Nov. 29, 2013).

⁷⁰ 8 C.F.R. § 236.3(h) (2013).

⁷¹ See *Perez-Funez v. Dist. Dir., INS*, 619 F. Supp. 656, 666 (C.D. Cal. 1985) (affirming that unaccompanied minors must be notified of the opportunity to call for legal assistance).

⁷² 8 C.F.R. § 1240.26(b)(C).

⁷³ *Id.* § 1240.10(c).

expand into the immigration system as well.

III. BRIEF HISTORY OF MINORS' VULNERABILITY UNDER THE LEGAL SYSTEM

Historically, the United States legal system acknowledged the inherent vulnerability of minors and adjusted legal protections accordingly. The United States Constitution does not expressly afford specific status, rights, or obligations for children.⁷⁴ Presumably, the framers of the Constitution felt children were already protected through the common-law parental power and concern for their children's interests.⁷⁵ Notwithstanding, the creation of the United States juvenile courts provided a judicial system for minors that adapted to the unique characteristics of its population as compared to adult criminal courts.⁷⁶ Beginning in the nineteenth century, "[t]he desirability, even necessity, for a separate court system to address the problems of young people appeared obvious, given the newly emerging view of the adolescent as an immature creature in need of adult control."⁷⁷ The newly created juvenile courts were not merely adult run institutions to maintain order among minors. Juveniles began to receive constitutional rights in recognition of their protection under the United States Constitution. The United States Supreme Court specifically noted that the constitutional rights of individuals do not arise merely with age, but protect all minors as well as adults.⁷⁸

The traditional juvenile court system focused heavily on rehabilitation rather than punishment and conducted proceedings with an immense amount of judicial discretion and informal procedures.⁷⁹ It was difficult to ensure fair and efficient proceedings for juveniles prior to the recognition of their constitutional rights.⁸⁰ Historically, the general right to counsel applied to those in criminal proceedings who faced a possible deprivation of their liberties.⁸¹ It is estimated that, in that era, as few as five percent of juveniles were represented by legal counsel in delinquency proceedings.⁸²

⁷⁴ *In re Gault*, 387 U.S. 1, 13 (1967); DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 32 (2d ed. 2003).

⁷⁵ ABRAMS & RAMSEY, *supra* note 74, at 33.

⁷⁶ *Id.* at 1059.

⁷⁷ BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 12 (1993) (quoting Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. Rev. 1083, 1097 (1991)).

⁷⁸ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

⁷⁹ FELD, *supra* note 77, at 7.

⁸⁰ See *In re Gault*, 387 U.S. 1, 18 (1967) ("The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures.").

⁸¹ See Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. JUST. 169, 172 (2010) (noting that *Gideon v. Wainwright* established a right to counsel for all indigent individuals in criminal proceedings).

⁸² FELD, *supra* note 77, at 27.

However, the Supreme Court later extended due process protections beyond the criminal context. The pivotal Supreme Court case, *In re Gault*, held that children are encompassed as persons under the Fourteenth Amendment and should be afforded several due process rights.⁸³ The Court noted:

The juvenile needs assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child “requires the guiding hand of counsel at every step in the proceedings against him.”⁸⁴

The Court extended many rights—including the right to have notice of charges, to confront and cross-examine witnesses, to avoid self-incrimination, and to counsel—to all juveniles in delinquency proceedings.⁸⁵ The Court reasoned that legal representation is essential in ensuring a child’s right to a fair proceeding,⁸⁶ stating:

[N]o single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, *is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires*. The rights to confront one’s accusers, to cross-examine witnesses, to present evidence and testimony of one’s own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, [and] to take an appeal have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively.⁸⁷

The above statement was prefaced on the recommendations made to the Court by the President’s Commission on Law Enforcement and the

⁸³ See *id.* at 19 (stating that in *In re Gault* the Court afforded minors due process rights, overcoming the Constitution’s failure to mention minors explicitly and without even addressing the Sixth Amendment).

⁸⁴ *In re Gault*, 387 U.S. at 36 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

⁸⁵ *Id.* at 41, 55–57; Nikki Smith, *Children’s Rights Nationally and Internationally During the Deportation of Their Parents or Themselves: Does the Right to Sovereignty Trump the Best Interest of the Child?*, 5 CRIT: CRITICAL LEGAL STUD. J. 1, 5 (2012).

⁸⁶ *In re Gault*, 387 U.S. at 38, 41; Finkel, *supra* note 17, at 1128.

⁸⁷ *In re Gault*, 387 U.S. at 38 n.65 (emphasis added) (quoting PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 86 (1967)) (internal quotation marks omitted), available at <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>.

Administration of Justice.⁸⁸ The general procedural rights afforded to these juveniles would not be a reality without the assistance of counsel.⁸⁹

Ironically, the civil nature of the juvenile court proceedings was in furtherance of the initial efforts to remove children from the adult criminal system and provide a more specialized approach to their unique situations.⁹⁰ *In re Gault* shifted the juvenile court image from a social welfare agency to a legitimate legal institution.⁹¹ The contemporary juvenile system, however, continues to mirror the adult criminal court, both procedurally and substantively.⁹² The Supreme Court has analogized juvenile delinquency findings to the seriousness of adult felony prosecutions.⁹³

Once again, in *Roper v. Simmons*,⁹⁴ the Supreme Court addressed the vulnerability of minors and formulated its holding based on the diminished culpability of juveniles.⁹⁵ The Court asserted that minors generally differ from adults in three ways: (1) their lack of maturity and underdeveloped sense of responsibility, which often leads to impetuous and ill-considered actions; (2) their vulnerability to negative influences; and (3) their character not being as well formed as adults.⁹⁶ The impact of such differences is substantial. As astutely recognized by Professor Barry Feld, a juvenile justice scholar, “only an attorney can redress the imbalance between a vulnerable youth and the state.”⁹⁷

The appointment of counsel in the juvenile court not only benefits its recipients, the defendants, but the juvenile administrative court system as a whole. The presence of counsel invokes a formal, due process-orientated proceeding that impacts pretrial detention rates, case preparation, and ultimate sentencing.⁹⁸ Our domestic legal system has transformed to keep up with the significant liberties at stake in each respective court; it is time the immigration system takes the same strides.

IV. BRIEF HISTORY OF THE IMMIGRATION SYSTEM

The United States did not pass uniform federal immigration laws until

⁸⁸ *Id.* at 38.

⁸⁹ ELLEN MARRUS & IRENE MERKER ROSENBERG, CHILDREN AND JUVENILE JUSTICE 16 (2d ed. 2012) (“[T]he lawyers are the heroes of the current round of reform; procedural revolution could nominate no one for this role but he who is trained and skilled in the tactics of the revolt.”).

⁹⁰ FELD, *supra* note 77, at 14.

⁹¹ *Id.* at 17.

⁹² *Id.* at 3.

⁹³ *In re Gault*, 387 U.S. at 36; *see also* FELD, *supra* note 77, at 3 (recognizing that *In re Gault* addresses the similar loss of liberty in both juvenile delinquency and adult felony cases).

⁹⁴ 543 U.S. 551 (2005).

⁹⁵ *Id.* at 569.

⁹⁶ *Id.* at 569–70.

⁹⁷ FELD, *supra* note 77, at 248.

⁹⁸ *Id.* at 37.

the late 1800s.⁹⁹ Beginning in 1880 through 1930, the United States' immigration policy reflected the sentiment of restrictionism.¹⁰⁰ Immigrants were viewed as "external threats to the welfare of the United States: as carriers of disease and moral disorder, culturally inassimilable others, threats to the political order and social stability, and unfree labor."¹⁰¹ The Alien and Sedition Acts of 1798¹⁰² placed the first limits on immigration in the United States.¹⁰³ The Acts allowed the President to deport immigrants who committed treason or were generally dangerous to the safety of the country.¹⁰⁴ In the late nineteenth century, most of the problems stemming from urbanization were blamed on "immigration problem[s]."¹⁰⁵ The misplaced blame legitimized the anti-immigrant sentiment overtaking the United States.¹⁰⁶ Due to the lack of judicial review, the political process held complete control over immigration policies.¹⁰⁷ Ironically, the population affected by these policies was prevented from contributing to the political process.¹⁰⁸

The history of immigration in this country can easily be traced by the exclusion of certain minority¹⁰⁹ groups during specific time periods.¹¹⁰ The initial targets of exclusion were paupers and convicts, followed by the Chinese, and then contracted labor workers.¹¹¹ The late nineteenth century's immigration restrictions portrayed the current ideals of race, class, and ethnicity.¹¹² By excluding certain undesirable groups of immigrants, the United States could preserve the homogenous racial demographics.¹¹³ For example, Congress extended the Chinese Exclusion

⁹⁹ See KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 52 (2007) (noting that prior to the late 1800s immigration was controlled by state regulation).

¹⁰⁰ PATRICK ETTINGER, *IMAGINARY LINES: BORDER ENFORCEMENT AND THE ORIGINS OF UNDOCUMENTED IMMIGRATION, 1882–1930*, at 15 (2009).

¹⁰¹ *Id.*

¹⁰² ch. 54, 1 Stat. 566; ch. 58, 1 Stat. 570; ch. 56, 1 Stat. 577; ch. 74, 1 Stat. 596.

¹⁰³ ETTINGER, *supra* note 100, at 16.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 19.

¹⁰⁶ See *id.* ("The public discussion of problems linked to immigration 'gave intellectual respectability to anti-immigrant feelings.'" (quoting JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925*, at 39 (1955)).

¹⁰⁷ JOHNSON, *supra* note 99, at 53.

¹⁰⁸ *Id.*

¹⁰⁹ The term minority is used generally to depict a subset of individuals who were seen as not the majority and thus were susceptible to deportation and exclusion from mainstream society. ETTINGER, *supra* note 100, at 16–19.

¹¹⁰ *Id.* at 20, 25.

¹¹¹ See *id.* at 20, 25, 30–31 (noting that this is merely an example of excluded groups, not an exhaustive list).

¹¹² *Id.* at 35.

¹¹³ JOHNSON, *supra* note 99, at 50.

Act of 1882¹¹⁴ for an additional ten years due to “white anxieties” about the ever-changing racial imbalance.¹¹⁵ By 1902, Congress made the ban against Asian immigration permanent.¹¹⁶ In furtherance of the anti-Asian sentiment of the time, Congress also enabled the Gentlemen’s Agreement with Japan to limit Japanese immigration to the United States.¹¹⁷

By 1907, immigration policy excluded at least eight “minority” groups: Asians, immoral individuals such as prostitutes, the politically subversive, contract laborers, paupers, convicts, and the mentally and physically ill.¹¹⁸ The policy supported the fear and apparent protection of the United States’ culture, economy, and political system.¹¹⁹ Immigration politics mirrored the cultural and economic climate in society, “[t]he cyclical nature of immigration politics—and thus immigration law and policy—often has been directly linked to the overall state of the U.S. economy and the perceived social evils of the day.”¹²⁰ The federal immigration law enacted in 1917, the Immigration and Nationality Act,¹²¹ continues to regulate immigration today in its revised form.¹²² Since its enactment, a sense of suspicion accompanies each immigrant that attempts to enter the United States.¹²³

As citizens began to attack the perceived social evils, the immigration policies had to adjust to the new cultural climate. The cultural shift that emerged from the Civil Rights Movement of the 1950s and 1960s forced Congress to reevaluate its immigration policies.¹²⁴ The Immigration Act of 1965¹²⁵ terminated the discriminatory quota system embedded in immigration policy.¹²⁶ This Act was viewed as a significant stride toward colorblindness in immigration initiatives. However, immigration laws continue to discriminate against particular minority groups.¹²⁷ In other words, “the tune has changed, but the song remains the same.”¹²⁸

¹¹⁴ ch. 126, 22 Stat. 58.

¹¹⁵ ETTINGER, *supra* note 100, at 71.

¹¹⁶ Scott Act, ch. 641, 32 Stat. 176 (1902); ETTINGER, *supra* note 100, at 71.

¹¹⁷ ETTINGER, *supra* note 100, at 71.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ JOHNSON, *supra* note 99, at 45.

¹²¹ Pub. L. No. 64-301, ch. 29, 39 Stat. 874 (1917).

¹²² See JOHNSON, *supra* note 99, at 54 (noting that the Immigration and Nationality Act has been amended almost annually). The 1917 Immigration and Nationality Act was the first law to allow deportation due to a criminal conviction. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478–79 (2010) (discussing the history of the Immigration and Nationality Act of 1917).

¹²³ JOHNSON, *supra* note 99, at 45.

¹²⁴ *Id.* at 51.

¹²⁵ Pub. L. No. 89-236, 79 Stat. 911.

¹²⁶ JOHNSON, *supra* note 99, at 51.

¹²⁷ See, e.g., *id.* (noting that certain immigrants face abnormal visa waits and more resistance in trying to enter the United States).

¹²⁸ *Id.* at 52.

Officially, the Immigration and Nationality Act currently excludes immigrants with health risks, criminal risks, or security risks; with document defects or inadequate labor certifications; with likely “public charges”; who are ineligible for citizenship; and who have already been removed from the United States.¹²⁹

V. ONE IN THE SAME: MINORS IN IMMIGRATION COURT VERSUS JUVENILE COURT

The United States’ legal recognition of the vulnerability of its children reflects the need to treat minors differently in the legal system at large, including immigration court. Key similarities between the juvenile court system and immigration system support the proposition that minors should be treated analogously and afforded the right to appointed counsel. These similarities include the majority age rule, characteristics of minors, their diminished capacity and culpability, and the seriousness of the legal proceeding. The logic of enacting the juvenile court system and special rights for minors should be translated into the immigration court system.

Children’s rights under the law apply until a general age of majority is reached, which is eighteen years of age for most rights and obligations.¹³⁰ Some statutes distinguish circumstances in which the age of adulthood exceeds eighteen years old,¹³¹ but the juvenile justice system, as well as society, draws the line between childhood and adulthood at age eighteen.¹³² Similarly, the immigration legal system stipulates that the age of eighteen is the divider between minor and adult status.¹³³

All children hold specific characteristics that impact how they must be treated under the legal system. Minors maintain a diminished mental capacity to understand and take into account the possible detrimental effects of their actions.¹³⁴ They lack experience, judgment, and mental culpability to be held to a legal standard developed for adults. Society views children as malleable and vulnerable until they reach adulthood.¹³⁵ The Supreme Court has emphasized the profound vulnerability of minors

¹²⁹ *Id.* at 55.

¹³⁰ ABRAMS & RAMSEY, *supra* note 74, at 14–15.

¹³¹ *Id.* at 8.

¹³² *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

¹³³ *See, e.g.*, 6 U.S.C. § 279(g)(2) (2012) (defining an “unaccompanied alien child” as being under the age of eighteen); 8 C.F.R. § 1240.10(c) (2013) (prohibiting legal admissions by unrepresented respondents under the age of eighteen).

¹³⁴ *See Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (“[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”).

¹³⁵ FELD, *supra* note 77, at 8.

and their lack of maturity and judgment to make critical decisions.¹³⁶ Yet, the fact that children lack the capacity of an adult does not translate to children being afforded lesser rights.¹³⁷

Both immigration and juvenile courts treat voluntary admissions by minors with a specialized lens. In juvenile court, judges proceed with caution when ruling on a waiver by a child because a minor is *presumed* to lack the necessary knowledge and maturity to give a valid waiver of legal counsel.¹³⁸ Thus, juvenile courts apply greater scrutiny on waivers of counsel to ensure the constitutional and procedural guidelines apply in a just manner. The Connecticut Supreme Court observed that “[i]t is now commonly recognized that courts should take ‘special care’ in scrutinizing a purported confession or waiver by a child.”¹³⁹ The court noted that the presence of any adult, such as parents or legal guardians, does not impact the level of scrutiny given to waivers by minors.¹⁴⁰

Voluntary departure procedures in immigration are the first of their kind to explicitly distinguish between children and adults in removal proceedings and ensure that unrepresented minors do not make legal admissions.¹⁴¹ The clear recognition of the plight of unaccompanied minors led to the amended treatment during voluntary departure admissions. An immigration judge is prohibited from “accept[ing] an admission of removability from an unrepresented respondent who is incompetent or *under the age of 18 and is not accompanied by an attorney or legal representative*, a near relative, legal guardian, or friend.”¹⁴² Yet, as the Connecticut Supreme Court warned, “[a]t a minimum, the presence of a lay parent or guardian, with no training in law, is no guarantee that a child will be fully informed or meaningfully represented.”¹⁴³ If the judge does not accept the admission of removability, the judge will order another hearing on the issues.¹⁴⁴ A hearing on the issues allows both sides to submit evidence in support of their positions and present witnesses, as well

¹³⁶ See *Bellotti*, 443 U.S. at 634 (highlighting the weakness of minors in order to argue that minors’ constitutional rights do not equate to that of adults). However, the unequal constitutional rights of minors and adults can be argued to support the need for intervention—such as a right to appointed counsel—to oversee the decisions of minors when no other adult is assisting them. See Anne C. Dailey, *Children’s Constitutional Rights*, 95 MINN. L. REV. 2099, 2130–31 (2011) (noting that key juvenile justice cases turn on children’s immaturity and impaired decision making to support children’s procedural due process rights rather than children’s autonomy rights).

¹³⁷ Thronson, *supra* note 25, at 987.

¹³⁸ N.Y. FAM. CT. ACT § 249-a (McKinney 2013).

¹³⁹ *In re Manuel R.*, 543 A.2d 719, 725 (Conn. 1988).

¹⁴⁰ *Id.*

¹⁴¹ 8 C.F.R. § 1240.10(c) (2013).

¹⁴² *Id.* (emphasis added).

¹⁴³ *In re Manuel R.*, 543 A.2d at 725.

¹⁴⁴ 8 C.F.R. § 1240.10(c).

as the ability to cross-examine and object to any adverse evidence.¹⁴⁵

This process is arguably as serious and cumbersome on a minor as an admission of removability. Nothing in the removal proceeding changes after the EOIR judge refuses to accept an unaccompanied minor's admission. Thus, the intent behind prohibiting judges from accepting admission of removability from unrepresented minors should extend to the hearings as a whole. The same danger and injustice that motivated this procedural safeguard applies to all hearings before an EOIR immigration judge. The similarity of limiting voluntary admissions in both juvenile and immigration courts mandates unified treatment throughout the legal process, especially with the right to appointed counsel.

Although both the juvenile delinquency proceedings and removal hearings are civil in nature, the possible repercussions are profound. Juvenile delinquency proceedings are recognized as quasi-criminal proceedings. A quasi-criminal proceeding involves "[a]n offense not subject to criminal prosecution . . . but for which penalties can be imposed."¹⁴⁶ Juvenile respondents in quasi-criminal proceedings hold the right to government appointed counsel.¹⁴⁷ The Supreme Court first applied the civil label on deportation proceedings in *Fong Yue Ting v. United States*,¹⁴⁸ and the contemporary Supreme Court continues its historic holding that deportation will be treated as civil in nature.¹⁴⁹ The severity of quasi-criminal proceeding equates to the legal consequences of being deported; "[w]hile deportation proceedings are technically defined as civil in nature, '[i]n a significant number of immigration cases, the consequences of deportation seem as 'grievous' as the loss of liberty that comes with physical confinement."¹⁵⁰ The Court tries to distinguish deportation from the criminal court, but acknowledges that "deportation is nevertheless intimately related to the criminal process."¹⁵¹ The significance of the liberties at stake in such proceedings warrants sufficient due process protections. As the court astutely recognized, the severity of the legal punishment warrants heightened constitutional protections because

¹⁴⁵ *Id.*

¹⁴⁶ Walter S. Gindin, Note, *(Potentially) Resolving the Ever-Present Debate over Whether Noncitizens in Removal Proceedings Have a Due-Process Right to Effective Assistance of Counsel*, 96 IOWA L. REV. 669, 673 (2011) (alterations in original) (quoting BLACK'S LAW DICTIONARY 378 (7th ed. 1999)) (internal quotation marks omitted).

¹⁴⁷ *Id.*

¹⁴⁸ 149 U.S. 698 (1893); see Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1311 (2011) (discussing *Fong Yue Ting*). Deportation proceedings are now known as removal proceedings. Adams, *supra* note 81, at 169. These terms are used interchangeably in this Note.

¹⁴⁹ Markowitz, *supra* note 148, at 1312.

¹⁵⁰ Finkel, *supra* note 17, at 1109 (second alteration in original) (quoting Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1663 n.55 (1997)).

¹⁵¹ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

“[a] deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself.”¹⁵²

Unaccompanied minors face debilitating long-term consequences, which may not even register in their underdeveloped minds. For example, a young unaccompanied minor who receives a final order of deportation will find himself or herself barred from entering the United States legally for ten years.¹⁵³ A six-year-old unaccompanied minor is unlikely to be taking account of her future in ten years. The ramifications of her actions at such a young age could severely alter her life without it even resonating with her. The reality is that the specific characteristics of children require that an adult speak on behalf of those who may never understand the issues at hand or the ultimate consequences of their actions.¹⁵⁴

Ironically, the EOIR sought guidance from the procedures and guidelines of the domestic juvenile and family courts.¹⁵⁵ As the United States legal system recognized and tailored rights to the unique characteristics of minors, the EOIR explicitly acknowledged the “especially vulnerable population” of unaccompanied minors.¹⁵⁶ Furthermore, the EOIR went on to address the heightened complexity of immigration proceedings as a whole and the varying diminished capacities of children in understanding their removal proceedings.¹⁵⁷ The EOIR would not have designated specific juvenile dockets unless they were well aware of the challenges and special needs of unaccompanied minors.¹⁵⁸ The strong motivation behind the creation of juvenile dockets may be one of convenience, to allow the ORR to consolidate the transportation of children to the court at the same time.¹⁵⁹ Nonetheless, the intent behind the recent recommendations are symbolic of the EOIR’s acceptance that unaccompanied minors require specialized treatment. The government recognizes that children need legal assistance,¹⁶⁰ but will not ensure every child is represented.

¹⁵² *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

¹⁵³ Preston, *supra* note 2.

¹⁵⁴ Devon A. Corneal, *On the Way to Grandmother’s House: Is U.S. Immigration Policy More Dangerous than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN. ST. L. REV. 609, 622 (2004).

¹⁵⁵ See Guidelines for Immigration Court, *supra* note 13, at 3–4 (highlighting child sensitive procedures and the best interest of the child standard).

¹⁵⁶ Press Release, U.S. Dep’t of Justice, *supra* note 32.

¹⁵⁷ *Id.*

¹⁵⁸ See *id.* (noting that at least ten courts maintained juvenile dockets as of 2008).

¹⁵⁹ BYRNE & MILLER, *supra* note 9, at 22. But see Guidelines for Immigration Court, *supra* note 13, at 5 (advocating for juvenile dockets to ease transportation of children and improve ability of legal service providers to assist).

¹⁶⁰ See 6 U.S.C. § 279(b)(1)(I) (2012) (stating that ORR must provide an annual list of guardian and attorney representation services for unaccompanied minors).

In furtherance of the EOIR's minimal attempt to tailor the immigration process to the most vulnerable children, the ORR contracted with the Vera Institute of Justice to pilot a program that would improve legal services provided to the apprehended minors.¹⁶¹ In 2005, the pilot, Unaccompanied Children Pro Bono Project, began its three-year testing period.¹⁶² The outcomes and observations from the Vera Institute of Justice provided valuable insight into the unaccompanied minors' experiences but also exposed flaws in the system that require change. The pilot program found that 70% of the unaccompanied minors who remained in ORR custody received legal representation.¹⁶³ Notably, less than 1% of these minors are granted legal relief from removal.¹⁶⁴ At first glance, the pilot program's finding that more than a majority of minors receive legal representation appears to weaken the proposal of this Note to legally require appointed counsel. Yet, at minimum, 65% of the initial intake of unaccompanied minors into ORR custody is ultimately transferred out of their custody into the care of designated sponsors.¹⁶⁵ Notably, only a small percentage of these released minors receive pro bono legal representation.¹⁶⁶ "Thus, a *considerable* service gap exists for children who have been released from ORR custody."¹⁶⁷

As the pilot concluded in 2008, the ORR again contracted with the Vera Institute of Justice and started the Division of Unaccompanied Children's Services (DUCS) Access to Legal and Child Advocate Services Project.¹⁶⁸ Funding increased by five million dollars to widen the program's reach around the country.¹⁶⁹ In 2009, 6,092 unaccompanied minors were in ORR custody.¹⁷⁰ Approximately one year later ORR saw a 35% increase with 8,207 unaccompanied minors in its custody.¹⁷¹ In 2010, approximately 40% of all unaccompanied minors in ORR custody were identified as eligible for some form of legal relief from removal.¹⁷² Within

¹⁶¹ BYRNE & MILLER, *supra* note 9, at 5.

¹⁶² *Id.* at 22.

¹⁶³ *Id.* at 24.

¹⁶⁴ *Id.* at 4. Many of these cases result in removal or voluntary departure. *Id.* at 24. "Lack of legal representation nearly dooms the child to deportation." GARCIA, *supra* note 34, at 5.

¹⁶⁵ BYRNE & MILLER, *supra* note 9, at 17. Sponsors included parents, legal guardians, adult relatives, an adult or entity approved by the minor's parent or legal guardian, a licensed program, or an adult or entity approved by the ORR. *Id.* at 17-18.

¹⁶⁶ *See id.* at 24 (noting that released children can be screened and then matched accordingly with pro bono counsel).

¹⁶⁷ *Id.* (emphasis added).

¹⁶⁸ *Id.* at 6, 23.

¹⁶⁹ Linda Kelly Hill, *The Right to Know Your Rights: Conflict of Interest and the Assistance of Unaccompanied Alien Children*, 14 UC DAVIS J. JUV. L. & POL'Y 263, 272 & n.22 (2010).

¹⁷⁰ BYRNE & MILLER, *supra* note 9, at 10.

¹⁷¹ *Id.* The DUCS Access to Legal and Child Advocate Services Project serves about seven thousand children annually. *Id.* at 23.

¹⁷² *Id.* at 24-25.

the same year, the DUCS Access to Legal and Child Advocate Services Project provided in-house direct representation or pro bono counsel for 28% of detained minors.¹⁷³ By July 2011, approximately fifty ORR/DUCS funded facilities were operating in twelve states.¹⁷⁴ Despite the fact that much effort is being put forth to increase the statistics of legally represented unaccompanied minors, the limited resources cannot keep up.¹⁷⁵

VI. THE NEXT LOGICAL STEP

In recent years, the EOIR and the immigration community as a whole have made strides to help alleviate the evident challenges that unaccompanied minors face.¹⁷⁶ Although the intent behind these recommendations coincide with the acknowledgment of unaccompanied minors' vulnerability, further intervention must occur to preserve their legal rights. Therefore, EOIR's efforts must extend to a full commitment to unaccompanied minors. Permitting any unaccompanied minors to argue their own removal case is irrational and unconscionable.¹⁷⁷ At a recent Senate Judiciary Committee Hearing, Attorney General Eric Holder addressed the recent surge of unaccompanied minors, and stated: "It is inexcusable that young kids . . . have immigration decisions made on their behalf, against them . . . and they're not represented by counsel. That's simply not who we are as a nation."¹⁷⁸

If resources and funding are already being allocated, it is reasonable to extend the efforts to legally require immigration courts to appoint counsel when necessary. For example, the DUCS Access to Legal and Child Advocate Services Project provided some detained minors with pro se assistance, as a "friend of the court."¹⁷⁹ Legal service providers send friends of the court to assist and possibly speak for the child in immigration proceedings,¹⁸⁰ but they are "not acting as attorney of record."¹⁸¹ If legal service providers are already being placed in the courtroom and assisting

¹⁷³ *Id.* at 24.

¹⁷⁴ *Id.* at 14.

¹⁷⁵ *See id.* at 22–23 (noting that the Vera Institute of Justice pilot program effectively increased legal representation, but that volunteer pro bono representation alone cannot meet needs).

¹⁷⁶ Many of the recommendations that the EOIR has advocated the courts undertake have been discussed earlier in this paper. *See supra* text accompanying notes 156–61.

¹⁷⁷ Finkel, *supra* note 17, at 1115.

¹⁷⁸ *Hearing on Oversight of the Justice Dep't Before the S. Judiciary Comm.*, 113th Cong. (Mar. 6, 2013) (statement of Eric Holder, Att'y Gen. of the U.S.), <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e0c4315749c10b084028087a4aa80a73>.

¹⁷⁹ *See* BYRNE & MILLER, *supra* note 9, at 23–24 (discussing the DUCS's offerings of Know Your Rights orientations, legal screenings, court preparation and assistance, and limited pro bono legal representation).

¹⁸⁰ *Id.* at 23.

¹⁸¹ *Id.*

unaccompanied minors through the removal proceedings, then why not utilize the time and resources to appoint legal representatives? An effective and timely use of counsel would benefit the unaccompanied child and court system as a whole. For example, EOIR judges frequently extend the date of a hearing to allow an unaccompanied minor time to secure legal counsel, with no guarantee that counsel will become available.¹⁸² A continuance based on the uncertainty that a child will secure legal counsel deprives the system as a whole of time and vital resources.¹⁸³

To date, the EOIR seems content in deferring to pro bono representation. Yet, with the unprecedented numbers of unaccompanied minors in the system, the reliance solely on pro bono services will never ensure legal protection for all deserving minors. Pro Bono service providers are “overwhelmed and underfunded,” and pose a great risk of not guaranteeing that every child will be represented.¹⁸⁴ Even with the legal community honorably offering its time to help unaccompanied minors, the Women’s Refugee Commission estimated that approximately sixty percent of all children are unrepresented in removal proceedings.¹⁸⁵ A well-known pro bono organization, Kids in Need of Defense (KIND), has recruited more than 5,000 lawyers to help represent unaccompanied minors.¹⁸⁶ KIND admits, however, that it cannot assist the overwhelming amount of unaccompanied minors coming through the immigration system.¹⁸⁷ With sixty EOIR immigration courts across the country,¹⁸⁸ free legal services lack both in quantity of locations and available attorneys. Often, ORR facilities are in remote geographic locations and a lack of qualified pro bono attorneys reside in the area.¹⁸⁹ Some advocates propose the creation of a national network of trained pro bono attorneys dispersed across the country.¹⁹⁰ Likewise, if time and expense will be put into initiatives such as a national network, the EOIR should allocate those resources to the appointment of legal counsel in each EOIR court. Passionate and committed pro bono organizations could continue to serve the unaccompanied minor population, but there must be an additional safeguard to ensure that all children obtain representation. With the option to appoint counsel, each immigration court would have access to and be

¹⁸² Finkel, *supra* note 17, at 1133.

¹⁸³ During a continuance, children are spending more physical time in ORR facilities and utilizing their resources.

¹⁸⁴ AMNESTY INT’L, *supra* note 19, at 74.

¹⁸⁵ Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 49 (2011).

¹⁸⁶ Nazario, *supra* note 22.

¹⁸⁷ *Id.*

¹⁸⁸ *EOIR Court Listing*, *supra* note 33.

¹⁸⁹ GARCIA, *supra* note 34, at 5.

¹⁹⁰ *Id.*

served by trained, adequate legal representation.

Allowing even a low percentage of unaccompanied minors to proceed without legal representation severely undercuts the Constitution. The statistics alone illustrate the significant disadvantage unrepresented illegal minors face navigating the complex immigration system; ninety-three percent of asylum applications filed by respondents without legal representation are rejected.¹⁹¹ Unaccompanied minors who are inadvertently forced to proceed pro se file motions with the court based on templates.¹⁹² Simply filling out paperwork will not be the strongest strategy in the critical fight to stay in the United States.¹⁹³ These unaccompanied minors fill in as “lawyers,” having to be aware of courtroom procedures and legal techniques.¹⁹⁴ In addition, pro bono legal services are more inclined to take cases they believe are the strongest in obtaining legal relief from deportation.¹⁹⁵ The immigration system and the rights of unaccompanied minors cannot sustain the picking and choosing of the “model case.” Legal representation must go beyond taking the “best case scenario” and be appointed to all unaccompanied minors in need.

Unaccompanied minors are not the only population that will be assisted by providing appointed counsel. Immigration courts would benefit as well. Opponents may argue that providing appointed counsel would increase fiscal and administrative burdens.¹⁹⁶ Importantly, however, appointed counsel will improve the administration of removal proceedings.¹⁹⁷ The courts can save on expenses incurred by the delayed and inefficient handling of removal proceedings.¹⁹⁸ The majority of courts struggle with delay in immigration proceedings,¹⁹⁹ and:

Most immigration judges favor increased representation by legal counsel. Every day our judges conduct cases involving respondents who appear pro se The judges know how to be fair, even when only one side to the proceeding is represented by counsel. However, when you combine the complexity of immigration laws with the varying degrees of maturity of juveniles, it provides a greater challenge to judges to ensure that the proceedings are fair, and that the

¹⁹¹ See *id.* (providing data from the Transactional Records Access Clearinghouse).

¹⁹² Jarawan, *supra* note 26, at 132.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Preston, *supra* note 2 (explaining that pro bono attorneys were hesitant to represent a minor with a weak case).

¹⁹⁶ Finkel, *supra* note 17, at 1126.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1133.

¹⁹⁹ See AMNESTY INT’L, *supra* note 19, at 65 (stating that one reason why judges delay hearings is to allow minors the chance to obtain counsel).

juvenile understands the serious nature of the proceedings. If the judge knew that competent counsel were assured for every juvenile respondent, the efficiency of the hearing would be greatly improved.²⁰⁰

The most recent statistics showcase the need for experienced legal counsel in order to avoid further delays in the immigration caseload. The Justice Department Inspector General Michael E. Horowitz reported that, between 2006 and 2010, the immigration caseload rose from 308,652 to 325,326 and the number of proceedings completed declined from 324,040 to 287,207.²⁰¹ As the immigration courts struggled with the volume of their caseload, twenty-seven judges were added to increase the total number of immigration judges to 238.²⁰² An analysis from 2006 to 2010 reported that the average case length for non-detained immigrants was approximately seventeen and a half months with some cases taking over five years.²⁰³ Appointed counsel will ensure efficiency, assist respondents in properly navigating the immigration system, and eliminate the need for judges to order a continuance for respondents to find legal counsel.²⁰⁴

With the clear recognition of the plight of unaccompanied minors, the government has made slight progress toward ensuring the due process rights of minors by regulating legal admissions by unrepresented children. The immigration system as a whole will not be changed overnight. Step-by-step improvements will lead to a more just and efficient system. Stemming from the recent procedural safeguard for unaccompanied minors, a right to appointed counsel must be afforded to these children.

VII. THE STIGMA OF BEING “ILLEGAL”

Critical race theorists frequently analyze immigration law in the United States. One focus has been the limited judicial review of immigration policy.²⁰⁵ Congress holds practically an unlimited power to regulate

²⁰⁰ *Id.* (quoting *The Unaccompanied Alien Child Protection Act: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 10 (Feb. 28, 2002) (testimony of Michael Creppy, Chief Immigration J., Executive Office of Immigration Review)).

²⁰¹ Jerry Seper, *Immigration Court Faulted; Inspector Notes ‘Flawed’ Process, Case Backlog*, WASH. TIMES, Nov. 2, 2012, at A5.

²⁰² *Id.*; Jeremy Greenberg, *Immigration Courts Not Keeping Up With Caseload*, GEORGE MASON CIV. RTS. L.J. BLOG (Nov. 10, 2012), <http://civilrightslawjournal.com/blog/2012/11/10/immigration-courts-not-keeping-up-with-caseload/>.

²⁰³ *Id.*

²⁰⁴ *See* Workman, *supra* note 7, at 235 (“Overall, lack of representation renders proceedings more inefficient and delays detention, increasing the financial costs to taxpayers and the trauma to the child.”).

²⁰⁵ RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 126 (2d ed. 2012).

immigration.²⁰⁶ Therefore, judicial review of basic injustices cannot be challenged in court.²⁰⁷ Currently, clear due process violations of unaccompanied minors will go uncontested due to the lack of judicial review. Critical race theorists view this harsh treatment against immigrants, many of whom are fleeing grave violence and poverty, as the “magic mirror into the heart of America.”²⁰⁸ Presumably, the “magic mirror” reveals how Americans treat immigrants and equally how they would treat their own citizens of color if the safeguard of judicial review did not exist in domestic courts.²⁰⁹ The types of groups excluded by immigration law are precisely those groups within the United States that cannot be legally discriminated against.²¹⁰ To an immigrant, the continuous threat of deportation counteracts any feeling of belonging in America.²¹¹ Deportation may be ordered based on such issues as minor technical violations or criminal convictions.²¹² The risk of deportation distinguishes United States citizens from immigrants; United States citizens will *never* fear deportation, regardless of their conduct.²¹³ The term “illegal aliens” conjures up adverse feelings of intruders that the United States has historically tried to keep out of society.²¹⁴

Critical race theorists look to personal narratives and how they inform current jurisprudence of discrimination in the United States.²¹⁵ The narratives of outsiders, such as unaccompanied minors, shed significant light on the fact that laws cannot be created from a neutral perspective.²¹⁶ For example, the story of young Juan illustrates the harsh reality of the current immigration system. It is probable that the plight of unaccompanied minors was not considered when immigration laws were drafted. Perhaps the lack of appointed counsel was never thought to have invoked the unfortunate situation in which children would have to represent themselves against the hard fist of the United States government. The narratives of unaccompanied children standing up against the government in a removal proceeding showcases the inherent injustice in disallowing right to counsel at government expense. This use of narrative should invoke genuine outrage in allowing young minors to stand alone in

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ JOHNSON, *supra* note 99, at 55. United States immigration law has discriminated against racial and political minorities, the poor, the disabled, and other marginalized minorities. *Id.* at 89.

²¹¹ *Id.* at 46.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Stephen Shie-Wei Fan, Note, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1205 (1997).

²¹⁶ *See id.* (emphasizing that the narrative form challenges the intrinsically raced jurisprudence).

such a serious and complex proceeding. It showcases the complexity of the immigration experience.²¹⁷

The narrative outlet acts as an enabling instrument and assures that aliens who have been rendered politically mute can nevertheless make themselves heard in the political and legal system. Immigration scholars can effectively relate the experiential dimension of immigration into a format accessible to those who create and interpret immigration laws.²¹⁸

In the past, the majority of immigration scholarship failed to truly hear the plight of the outsiders, such as aliens of color, who have been silenced politically and socially.²¹⁹ The stories and stark reality unaccompanied minors face in the immigration system can help shift the awareness towards those who create and interpret immigration laws.

Unaccompanied minors mirror children in our society that the government vows to protect and accommodate within our domestic legal system. The only barrier that has stripped these children of due process protection is their illegal status. Unaccompanied minors face the inevitable barriers with their hybrid identities, as both illegal aliens and children.²²⁰ Historically, both identities have been denied constitutional rights. The fact that these children enter into the United States illegally should not affect or alter their status as vulnerable children. Their diminished culpability and need for guidance, especially in a foreign country, does not diminish upon arriving in United States territory. The intent of protecting children similarly situated in juvenile court must apply to unaccompanied minors in removal proceedings. The pervasive discrimination against illegal immigrants must be combated to ensure minors receive basic justice as required under law.

VIII. CONCLUSION

The right to appointed counsel must extend to all unaccompanied minors. Critics may contest that many unaccompanied minors are near the age of majority and thus have the maturity to make critical decisions. However, nearly all unaccompanied minors, with varying ages and maturity levels, have a diminished understanding of their circumstance and

²¹⁷ *Id.* at 1234.

²¹⁸ *Id.* at 1235 (footnotes omitted).

²¹⁹ *Id.* at 1239.

²²⁰ Corneal, *supra* note 154, at 625.

the complexity of the immigration system.²²¹ “Even the intelligent and educated layman . . . sometimes [has] no skill in the science of law.”²²²

In the most extreme circumstances, if the government does not provide the most basic justices, these children could literally be sent home to die. The government can no longer ignore the recent surge of unaccompanied minors. The sheer statistics require a policy change to ensure all children are receiving their basic rights. The immigration system cannot continue to rely on the hope that pro bono organizations will intervene in every case; it is time to enact legislation that will fix this problem once and for all. The pro bono support network is ill-equipped to handle the case of every unaccompanied minors that needs representation. The immigration system will drown with the overwhelming volume of unaccompanied minors and resort to violating their most basic rights in the process. Although this nation holds dividing views on immigration, the issue of protecting vulnerable children’s rights should unify all.²²³ America must end the message that the United States will not protect the most fragile and distressed children, the future of our society. As Justice Frankfurter appropriately recognized, “[c]hildren have a very special place in life which law should reflect.”²²⁴

²²¹ See *Perez-Funez v. Dist. Dir., INS*, 619 F. Supp. 656, 662 (C.D. Cal. 1985) (reviewing testimony of unaccompanied minors with a wide range of ages and declaring that they all lacked understanding and their age made little difference).

²²² *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

²²³ *Nazario*, *supra* note 22.

²²⁴ *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).